

No. 16553

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DAN O. HOYE, as Controller of the City of Los Angeles,  
DAN O. HOYE, and THE CITY OF LOS ANGELES,  
*Appellants,*

*vs.*

UNITED STATES OF AMERICA and ROBERT A. RIDDELL,  
Director of Internal Revenue,  
*Appellees.*

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On Appeal From the Judgment of the United States District  
Court for the Southern District of California.

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## BRIEF FOR THE APPELLEES.

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## BRIEF FOR THE APPELLEES.

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### Opinions Below.

The opinions of the District Court [R. 61-79] are reported at 169 F. Supp. 474 and 172 F. Supp. 532.

### Jurisdiction.

This appeal arises out of proceedings by the United States to collect 1955 income taxes due and owing from one Richard A. Westberg by levy upon his accrued salary in the hands of the controller, Dan O. Hoye, of the City of Los Angeles. The levy was served on March 19, 1957, and the final demand for payment was made on June 25,

1957. [R. 82-83.] On September 10, 1957, the controller, Dan O. Hoyer, filed in the District Court a complaint to quash the notice of levy and final demand, naming as defendants the United States, Riddell, the Director of Internal Revenue, and Westberg. [R. 3-7, 12.]<sup>1</sup> On November 8, 1957 the United States filed a motion to intervene [R. 12-13], with a proposed complaint in intervention to enforce the lien [R. 14-17], and also a motion to dismiss the Hoyer complaint [R. 18-20]. On February 6, 1958 the District Court entered a formal order permitting intervention by the United States and granting the Government's motion to dismiss. [R. 20-21, 27.] An appeal was taken by the appellant Hoyer from this order, to this Court, but in the meantime the United States filed its amended complaint in intervention [R. 22-26], which the appellants as defendants in intervention answered. [R. 39-55.] The facts were stipulated and the issue of the validity of the levy was tried in the suit brought by the United States. Judgment was entered on April 22, 1959, that the appellants take nothing by their complaint and dismissing their complaint, and granting judgment in favor of the United States against the City of Los Angeles for the amount of the levy, while the court retained jurisdiction of the suit against Hoyer personally, should the judgment against the City of Los Angeles not be paid. [R. 87-88.] The notice of appeal from this judgment was filed on June 17, 1959 [R. 89-90], and a supersedeas bond was filed. [R. 92-94.] The jurisdiction of this Court rests upon 28 U. S. C., Section 1291.

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<sup>1</sup>The record references are to the record on this appeal and the record in the prior appeal No. 15964, which is consecutively paginated. [See Stipulation R. 103-104.]

### Questions Presented.

1. Whether the accrued salary of a municipal employee in the possession of the city controller is subject to levy for unpaid federal taxes of the employee.

2. Whether the prior appeal of the controller from the dismissal of his suit for a declaratory judgment and to enjoin the collection of taxes is mooted by the final determination in the Government's suit that the levy is valid.

3. Whether, if the prior appeal is not moot, the controller's suit for declaratory judgment and injunction was properly dismissed.

### Statutes and Rules Involved.

The statutes and rules are printed in the appendix to the brief for the appellees on the prior appeal.

### Statement.

The facts of the case are not in dispute, and, as set forth in the stipulation [R. 56-60] and findings of fact [R. 81-87] of the District Court, may be summarized as follows:

On August 15, 1956, an assessment of income taxes for the year 1955 together with penalties and interest in the aggregate amount of \$150.63 was duly made against Richard A. Westberg, an employee of the City of Los Angeles, and hereinafter referred to as the taxpayer. Although notice of this assessment was duly given and demand for payment made upon the taxpayer no part of such assessment has been paid by him. [R. 82.] The interest on this liability accrues at the rate of 2 cents a day. [R. 82.] On March 19, 1957, a notice of levy in the amount of \$155.93 was duly served upon Dan O. Hoye, the controller of the City of Los Angeles (herein-

after referred to as the controller or Hoyer), upon property and rights to property in the possession of Hoyer belonging to the taxpayer. [R. 82-83.] On June 25, 1957, a final demand for payment of the amount of the levy was duly served upon Hoyer. On the date of the notice of levy and final demand the City of Los Angeles was indebted to the taxpayer, by reason of his employment, in the amount of \$158.78. [R. 83.] This sum was not paid over to the United States by Hoyer, but has been held by him on the contention that the levy was invalid since the United States was required to proceed in accordance with the procedure for the garnishment of salaries of municipal or state employees, as provided by Section 710 of the Code of Civil Procedure of the State of California. [R. 83-84.] The appellant acted in good faith in refusing to honor the levy on this account, and filed a suit for a declaratory judgment and injunction for the purpose of procuring a judicial declaration of the validity of the levy. [R. 84.]

The suit filed by Hoyer was in the form of a complaint against the United States, Robert A. Riddell, Director of Internal Revenue, and the taxpayer, entitled "COMPLAINT TO QUASH A 'NOTICE OF LEVY' AND 'FINAL DEMAND' SERVED ON A MUNICIPAL CORPORATION BY THE DIRECTOR OF INTERNAL REVENUE." [R. 3.] The United States filed a motion to intervene [R. 12-13], together with a complaint in intervention [R. 14-18] and a motion to dismiss the Hoyer complaint. [R. 18-20.] On February 6, 1958, the District Court permitted intervention by the United States [R. 20] and entered minutes granting the motion to dismiss. [R. 21.] On February 24, 1958, the United States filed its amended complaint in intervention alleging two causes of action: the first was against Hoyer personally for failure to pay over the amount of the levy [R. 22-



24]; the second cause of action was against Hoyer, the City of Los Angeles, and the taxpayer, to foreclose the tax lien and enforce the levy upon the accrued salary of the taxpayer, due to him from the City and in the possession of Hoyer. [R. 24-26.]

The order granting the motion to dismiss was entered on March 10, 1958. [R. 27-28.] On March 14, 1958, Hoyer, individually and as controller, filed a notice of appeal from this order. [R. 28-29.] The taxpayer never answered or otherwise appeared in the actions. Hoyer and the City on April 14, 1958, filed a lengthy answer to the complaint in intervention. [R. 39-55.] In this answer, Hoyer and the City put in issue the validity of the levy on the ground that it did not comply with Section 710 of the California Code of Civil Procedure [R. 40-45]; and Hoyer further alleged as a first defense to the Government's suit, that unless the state statute was followed, Hoyer would be personally liable to the taxpayer for the salaries [R. 48-49.] Hoyer also stated in the answer that he would deposit the levied funds with the Clerk of the Court. [R. 49.] In a second defense to the Government's suit, it was alleged that Hoyer had brought a suit to quash the levy which had been dismissed, that an appeal was pending from the dismissal of this suit and that an application had been denied by the District Court for an extension of time to answer the complaint in intervention, pending the appeal. [R. 49-53.] Neither Hoyer nor the City, however, took any appeal from the denial of their request for such an extension of time to answer the complaint in intervention, nor did they in any other way seek a stay of the proceedings in the District Court to determine the validity of the levy in the suit brought by the United States.

This suit was heard upon a stipulation of facts [R. 56-60], as set forth above, and on December 11, 1958, the District Court entered its decision holding that the validity of the levy was to be tested in the suit in intervention to enforce the levy brought by the United States, that the levy was valid since the federal tax levy could not be limited by state law, and that payment of the accrued salary to the United States would discharge the City and the controller of any liability to the employee-taxpayer. [R. 61-69.]<sup>2</sup> The court directed the United States Attorney to submit proposed findings of fact, conclusions of law and judgment as prayed for in the complaint in intervention. [R. 69.]

This decision was called to the attention of the Clerk of this Court, and on March 2, 1959, this Court, having previously denied a motion to dismiss the prior appeal (No. 15964), entered an order in the prior appeal reading as follows:

IT IS HEREBY ORDERED that the order of submission heretofore filed by this court in the above numbered case of December 3rd, 1958, is vacated and the determination of this appeal held in abeyance pending the complete trial of the Government's case in intervention, Civil No. 1065-57-T, in the court below and until such time as either an appeal is taken from

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<sup>2</sup>On December 12, 1958, the court issued a Note to its Memorandum Decision of December 11, clarifying the first opinion with respect to the fact that the United States did not bring a suit for a declaratory judgment but rather brought a suit at law to foreclose its lien and collect on the levy. [R. 69-71.]

the judgment in intervention, or the time for taking such an appeal expires and this court is formally advised of either fact.<sup>3</sup>

On April 22, 1959, the District Court entered a supplemental opinion, (entitled Addendum to the Memorandum of Decision) [R. 71-79] together with its findings of fact, conclusions of law and judgment. [R. 80-88.] In this supplemental opinion, the court rejected the claim of the United States to recover judgment for the amount of the levy against Hoyer personally as a penalty for the refusal to honor the levy, and also to recover the amount of the levy from the City of Los Angeles in foreclosure of its lien upon the accrued salary of the taxpayer. The court held that the United States could not have both amounts, since the purpose of the so-called "penalty" against a person in possession of property of a delinquent taxpayer was to insure the collection of the levy. In this case, the controller had not defeated the levy by paying it out, but held the levied funds pending a judicial determination of the validity of the levy, so that there was no basis for a penalty against Hoyer personally, unless the City of Los Angeles failed to pay the judgment against it.

In its conclusion of law [R. 85-87] the court ruled that it did not have jurisdiction over the subject matter of the Hoyer complaint or over the United States as a party thereto. It also ruled that the deposit of the levied funds

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<sup>3</sup>The appellants' brief incorrectly states that the trial on the merits of the case took place in the District Court after the entry of this order. (Supp. Br. 2.)

with the Clerk of the District Court was not a compliance with the levy or a valid interpleader. [R. 85.]<sup>4</sup> The judgment below [R. 87-88] provides that the appellants take nothing and that the Hoyer complaint be dismissed; that the United States take nothing on its first cause of action against Hoyer personally, and that the United States have judgment in foreclosure of its lien against the City for the amount of the levy and costs. Jurisdiction, however, was retained over the action against Hoyer personally to enter judgment, if the City did not pay the judgment against it.

### Summary of Argument.

The substantive issue involved in this appeal, whether accrued salaries of public employees are subject to federal tax levy, has been conclusively settled by *Sims v. United States*, 359 U. S. 108. The procedural question, whether the validity of the levy in this case was to be determined in a suit brought by the official in possession of the levied salary for a declaratory judgment and to enjoin the levy, or in a suit by the United States to enforce the levy, has been rendered moot by the decision on the merits. In any case, if this question is not moot, the court below correctly dismissed the suit for a declaratory judgment and to enjoin the levy.

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<sup>4</sup>The appellants do not raise any question here as to this ruling, and the interpleader statute, 28 U. S. C., Section 1335, does not authorize such suits against the United States. *Herter v. Helmsley-Spear, Inc.*, 149 F.Supp. 713 (S.D. N.Y.).

## ARGUMENT.

### I.

**The Accrued Salary of a Municipal Employee in the Possession of a City Controller Is Subject to Federal Tax Lien and Levy for Unpaid Federal Taxes Due From the Employee.**

It is clear from the undisputed facts in this case that the underlying substantive issue involved is whether or not the accrued salary of a municipal or state employee, who is delinquent in federal tax, is subject to federal tax lien and levy. This, in final analysis, is the only issue that was raised by the Hoyer complaint and it is the only issue that was raised by the Government complaint in intervention. The court below has held that such salaries are subject to the federal tax levy, and the appellants do not offer any argument or citation of authority to show that this decision is wrong. The short of the matter is that no argument or citation of authority is available to the appellants, since the decision of the court below is in accord with *Sims v. United States*, 359 U. S. 108. The claim of the appellants (Supp. Br. 4-5), that the local and state officials of the State of California are now confronted with a dilemma presented by the asserted conflict between the federal tax levy provisions and Section 710 of the California Code of Civil Procedure, has no substantive foundation whatever. It is now settled that such state law provisions must yield to the federal statutes with respect to the collection of taxes. *Sims v. United States*, *supra*.

The alleged conflict between the decision of the court below and the decision of the District Court in *Hoye v. United States*, 109 F. Supp. 685 (Supp. Br. 3-4) has to do solely with a procedural problem as to how the validity of a federal tax levy could be tested, before its validity had been decided, whether in a suit for a declaratory judgment and injunction to enjoin the collection of taxes brought by the public paymaster, or in a suit by the United States to enforce the lien and levy pursuant to federal statute. Internal Revenue Code of 1954, Section 7403. But that issue, as we shall now show, has been rendered moot by the decision on the merits, and if it is not moot, then, we submit, it was correctly decided by the court below.

## II.

### **The Question Whether the Validity of the Federal Tax Levy Can Be Tested in a Suit Brought by the Controller for a Declaratory Judgment and Injunction or in a Suit Brought by the United States to Enforce the Lien and Levy Is Now Moot.**

We wish first to suggest that, in any event, the prior appeal (No. 15964), and the procedural issue therein presented, is now moot, since the question whether the Hoye suit was properly dismissed is before this Court in the appeal from the final judgment of the District Court. *Moore Drydock Co. v. Pillsbury*, 98 F. 2d 115 (C. A. 9th).

Furthermore, as presented in the appeal from the final judgment, the procedural issue is moot on the ground that the court has rendered a decision on the merits, which would deny Hoye the relief sought even if the court below had jurisdiction of his complaint. A reversal of



the court below, on the ground that it should have considered the Hoyer complaint, would be pointless, since the only result would be a decision on the merits dismissing the complaint. *Alaska Packers Assn. v. Marshall*, 95 F. 2d 279 (C. A. 9th); *Federal Reserve Bank v. Idaho Grimm Alfalfa Seed G. Assn.*, 8 F. 2d 922, 924-925 (C. A. 9th), *certiorari denied*, 270 U. S. 646; *California Fruit Cannery Assn. v. Lilly*, 184 Fed. 570, 574 (C. A. 9th).

### III.

**If the Question Under Point II Is Not Moot, Then the Court Below Was Correct in Dismissing the Complaint for a Declaratory Judgment and to Enjoin the Collection of Taxes.**

We believe that the Hoyer complaint on its face shows that it falls squarely within the statutory prohibitions against suits for a declaratory judgment or an injunction to enjoin the collection of federal taxes. 28 U. S. C., Sections 2201 and 2463. Neither the City nor the controller admittedly has any interest in the levied funds. [R. 49.] If the controller has any question as to the validity of a levy, he may simply await a judicial determination of that question in a suit brought by the United States to foreclose the lien. As long as he does nothing to impair the lien or dissipate the levied funds, he does not incur any risk or penalty.<sup>5</sup> There is no reason why a third person having no interest in the levied fund except as a stakeholder should be allowed to delay or hinder the col-

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<sup>5</sup>The Government is not appealing from the judgment below which holds that Hoyer is not personally liable, the court below merely retaining jurisdiction to enter judgment against him in the event the City fails to pay the judgment against it.

lection of taxes in any way by being permitted to bring a suit to enjoin the collection of such taxes.

We have set forth our argument on this point in full under Point II of our brief in the prior appeal and as stated in that brief (p. 19):

Indeed, the prohibition against suits restraining the collection of taxes would be an empty form, if all persons holding property concededly belonging to the taxpayer—and in which the holder himself claims no interest—might prevent distraint and collection by bringing action for injunction or declaratory judgment.

### Conclusion.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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